LIBRARY
UPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 6 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, ETC., *et al.*,

Respondents.

BRIEF OF BATES BLOCK AS *AMICUS CURIAE*

LEE S. KREINDLER,
Attorney for *Amicus Curiae*,
Bates Block,
99 Park Avenue,
New York, N. Y. 10016.

Of Counsel:

KREINDLER & KREINDLER,
LEE S. KREINDLER,
GERALD A. ROBBIE.

INDEX

	PAGE
Interest of the *Amicus*	1
Summary of Argument	2
POINT I—The legislative history of the Warsaw Convention demonstrates that an adequate and reasonable notice of the damage limitation contained in Article 22 must be given in the passenger ticket before the carrier can take advantage of said limitation	3
POINT II—The notice of the Convention's limitation contained in the ticket at bar is so small as to be unnoticeable. Failing to provide an adequate and reasonable notice, the carrier may not take advantage of the damage limitation contained in Article 22	9
POINT III—Even if the notice contained in the ticket at bar is held to be readable, its language is so uninformative that it does not constitute the reasonable notice envisioned by the drafters and required by Article 3	11
Conclusion	12
Certificate	13
APPENDIX A—Model Ticket Annexed to Conference Minutes	A1

CASES: PAGE

Eck v. *United Arab Airlines, Inc.*, 360 F. 2d 804 (2d Cir. 1966) 9

Egan v. *Kollsman Instrument Corp.*, —— N. Y. 2d ——, December 28, 1967 (Slip Op.) 10

Grey v. *American Airlines, Inc.*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied* 350 U. S. 989 (1956) 7

Mertens v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied* 382 U. S. 816 (1965) 8

Sullivan v. *Behimer*, 363 U. S. 335 (1960) 9

TREATY:

Convention For The Unification of Certain Rules Relating To International Transportation By Air. 49 *Stat.* 3000-3026 ..... *passim*

OTHER AUTHORITIES:

II Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838 ..... 3, 4, 5, 6, 7, 8, 10, 11

LOWENFELD & MENDELSOHN, *The United States and The Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

v.

JOHN LISI, ETC., *et al.*,

Respondents.

BRIEF OF BATES BLOCK AS *AMICUS CURIAE*

Bates Block, as Executor of the Estate of Charles Baxter Jones, Jr., and as Guardian and Next Friend of three minor children of Charles Baxter Jones, Jr., and Julia Lowry Block Jones, deceased, respectfully submits this brief *amicus curiae* in support of the respondents, John Lisi, *et al.*, pursuant to leave granted him under Rule 42 of this Court's Revised Rules on January 29, 1968.

Interest of the *Amicus*

The interest of the *amicus* in this case was fully set forth in his motion for leave to file a brief, and may be briefly summarized as follows: he now has pending an action for the wrongful deaths of his two decedents in the United States District Court for the Northern District of Georgia, resulting from the crash of an Air France jet at Orly Field, Paris, on June 3, 1962. This is one of forty-five consolidated cases involving the deaths of sixty-

two decedents in that accident. The District Court and the Court of Appeals for the Fifth Circuit have held that the Warsaw Convention is applicable to the charter flight on which Mr. Block's decedents perished, and this question is now on petition for *certiorari* to this Court. Tickets of the same form were delivered to Mr. Block's decedents and therefore one of the issues involved in that case is the same as that presented for decision in the instant case, *viz.*, did said ticket provide adequate notice to the passenger of the limitation of damages contained in Article 22 of the Warsaw Convention? Indeed, the Court of Appeals as its final conclusion in the *Block* case stressed the importance of the ticket:

> "A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention. We hold therefore that the Convention applied to the transaction of the passengers in accordance with the charter flight agreement between Air France and the Atlanta Art Association." *Block* v. *Compagnie Nationale Air France,* ——, F. 2d ——, Slip. Op. p. 69 (5th Cir., Nov. 8, 1967).

Summary of Argument

The Warsaw Convention by its language and history requires that before a carrier can claim the advantage of the limitation on damages contained in Article 22, it must first provide an adequate and reasonable notice of said limitation to the passenger in a ticket which must be delivered to him.

Where the notice contained in the ticket is so miniscule as to be unnoticeable, adequate and reasonable notice has not been given to the passenger.

Assuming *arguendo* that the notice contained in the ticket was legible, its language was equivocal and uninformative and therefore it did not constitute the adequate and reasonable notice required by the Convention.

POINT I

The legislative history of the Warsaw Convention demonstrates that an adequate and reasonable notice of the damage limitation contained in Article 22 must be given in the passenger ticket before the carrier can take advantage of said limitation.

The legislative history of the Warsaw Convention is found in the minutes of the II Conférence Internationale de Droit Privé Aérien, [ICAO Doc.: 7838] held at Warsaw from October 4 to October 12, 1929 (hereinafter referred to as Conference minutes). An analysis of these minutes shows that the drafters of the Convention intended that a reasonable and adequate notice of the damage limitation of Article 22 be contained in the passenger ticket before the carrier could claim the benefit of such limitation.

Alitalia's position, that all that a carrier need do is deliver a ticket, without *any* notice provision whatsoever, is without foundation. Alitalia's selective extracting of the Conference minutes, which it claims leads to the conclusion that the "plain meaning" of Article 3 shows that no notice of the damage limitation is required, is misleading.

Translated into English the preliminary draft of Article 3 read as follows (pp. 167-168 of the Conference minutes):

"Article 3

For the transportation of passengers, the carrier must deliver a passenger ticket which shall contain the following particulars:

a. the place and date of issue;

b. the place of departure and of destination;

c. summary indication of the route to be followed (via) as well as provided stopping places;

d. the name and address of the carrier or carriers.

The passenger ticket shall contain, besides, a clause stipulating that the transportation is subject to the terms of liability established by this Convention.

The absence, irregularity or loss of this document of transportation shall not affect the existence or the validity of the contract of transportation.

If, for an international transportation, the carrier accepts the passenger without having established a passenger ticket, or if the ticket does not contain the above mentioned particulars, the contract of transportation shall nevertheless be subject to the rules of this Convention, but the carrier shall not have the right to avail himself of the provisions of this Convention which exclude all or part of his liability, direct or derived from the faults of his agents."

Thus, the preliminary draft version of Article 3 contained only *four* "particulars." The requirement regarding the notice of limitation of liability was not listed as a "particular", but as a separate substantive requirement.

The first pertinent discussion of the preliminary draft version of Article 3 appears on pages 100-101 of the Conference minutes. Our translation of the French is as follows:

"*Mr. DeVos,* Rapporteur . . . Thus, I would suggest adding, after letter d) of Article 3:

'e) the name, the address and the nationality of the passengers.'

These proposals have been rejected, which does not mean that they will not or would not appear on the

passengers' document of transportation: in fact, these particulars are there. But in the face of an observation by the Greek Delegate, which reads as follows: The last paragraph of the article decrees the sanctions in case of absence of the passenger ticket, or when the passenger ticket does not carry all the particulars indicated, from then on the sanction is too harsh, when there is a simple omission, a negligence of an employee of the company of transport—the commission has agreed with this viewpoint, and in the last paragraph, it eliminated the words: 'or if the document does not contain the above particulars.'

But the consequence of this was that one had to be much stricter for those particulars imposed on the passenger ticket, and we have only retained the minimum needed to consider the transport as our international transport, for the purposes of the Convention. . . . ."

Two points are significant. First, the rapporteur was referring to Article 3 in its preliminary draft form, not in its final text as adopted by the Conference. Secondly, DeVos was paraphrasing and condensing the actual proposal of the Greek delegate.

One must distinguish the preliminary draft of Article 3 from its final version*, which included *five* particulars,

---

* Article 3, as finally adopted by the Conference, read as follows:

"(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of

(Footnote continued on following page)

the last of which requires notice. The rapporteur was referring to the four particulars designated a, b, c and d, in the preliminary draft of Article 3, and *not* to the notice requirement which was important enough to warrant a separate and independent paragraph.

All doubt on this issue is resolved by reference to the actual language employed by the Greek delegate in his proposal. Conference minutes, 196-197 (our translation):

> "In conformity with Article 22 of the draft, in case of an accident, the carrier can set aside his liability if he proves that he and his agents have taken reasonable measures to avoid the damage, or that it was impossible for them to take any.
>
> However, according to Article 3, the carrier loses this advantage if the passenger ticket does not contain the particulars indicated in this article.
>
> It may happen, in fact that due to a simple neglect the carrier has omitted to mention in the passenger ticket *the place of issue,* or *the point of departure,* or *his name and address;* or even that he keeps on the ticket his old address, or finally, that he does not point out *an intermediate stopping place.*" (Emphasis supplied.)

(Footnote continued from preceding page)

necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

Thus the Greek delegate was concerned about purely clerical errors on the part of airline personnel. The examples he cites involve the four enumerated particulars contained in the preliminary draft of Article 3. It is crucial that he made no mention of the separate clause relating to notice of the limitation of liability. The reason of course was that is was not one of the "particulars indicated in this Article."

The Greek delegate went on to explain that the four particulars were unimportant to the passenger, and therefore omission of them should not deprive the carrier of the damage limitation. He stated:

> "These are, in general, omissions of no great importance for the party, because it is known, or easy to establish where the ticket was issued and that departure took place at the aerodrome of such town, that the plane belongs to such company, or that the stopping place may be of no interest to the contracting party.
>
> One may ask why such an omission, of no importance in most cases, should entail, in all cases, such a serious sanction as that provided by Article 3, paragraph 4. *If the omission is of no interest to the other party and causes no damage, how can this severe sanction of the carrier be justified?*" (Emphasis supplied) *Ibid.*

The language of the Greek proposal makes sense only when limited to the four particulars, the omission of any of which is "of no great importance." See, e.g., *Grey* v. *American Airlines, Inc.*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U. S. 989 (1956), in which the agreed stopping place—one of the four particulars specified in the preliminary draft of Article 3—was omitted from the ticket. The court held such an omission was "wholly unsubstantial." 227 F. 2d at 284.

However, where the omission would be of importance to the passenger in that it would cause him damage, the situation is completely different, and the Greek delegate understood this:

> "This sanction is only justified in case the omission of a particular would have caused a damage to the passenger, as it may happen under certain circumstances." Conference minutes, 197.

The delegate was of course still referring to the particulars in the preliminary draft of the Article, but if omission of one of its four particulars could "under certain circumstances" cause damage to a passenger, what could be said of omission of the notice provision? It is noteworthy that in the original draft *either* the failure to deliver a ticket *or* the failure of the ticket to have the particulars would cause the airline to lose the benefit of the limitation of damages. Notice of the limitation on liability is of vital interest to the passenger, and its omission would cause him extreme damage.

The court below properly determined that notice of the Convention's limitation was important and that its omission caused damage to the passenger, i.e., it deprived him of the opportunity to take self-protective measures with respect to the damage limitation. One such measure was specifically envisioned by Article 22 of the Convention which states, "Neverthless, by special contract, the carrier and the passenger may agree to a higher limit of liability." If the passenger does not know that the carrier's liability is limited in the first place, i.e., if an adequate and reasonable notice is absent from the ticket, then Article 22 is rendered meaningless. *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U. S. 816 (1965).

Petitioner erroneously contends that Article 3 as finally adopted does not require delivery of a ticket with a notice

as to the limitation of liability, and that the "plain meaning" of the Article—all that need be resorted to by a court—mandates such a conclusion. Such an approach, however, contravenes proper principles of treaty interpretation and sound reason. The language of the treaty should never become a "verbal prison". *Sullivan* v. *Behimer*, 363 U. S. 335, 358 (1960) (Frankfurter, J., dissenting). Analysis of it "* * *" may lead the court to conclude that the language of the provision only imperfectly manifests its purpose, * * *" (*Eck* v. *United Arab Airlines, Inc.*, 360 F. 2d 804, 812 [2d Cir. 1966]), and therefore:

> "It would be inconsistent with the 'wise counsel to reject "the tyranny of literalness,"' [citation] if the court in the latter situations did not seek to interpret the provision so as to effectuate its purpose, even if this requires departing in some measure from the letter and reading the language in a practical rather than literal fashion." *Ibid.*

The only way in which Article 3 can be construed so as effectuate the purposes of the Convention is to require that the passenger be afforded notice in the passenger ticket of the limitation of liability.

POINT II

The notice of the Convention's limitation contained in the ticket at bar is so small as to be unnoticeable. Failing to provide an adequate and reasonable notice, the carrier may not take advantage of the damage limitation contained in Article 22.

It is apparent from an inspection of the ticket at bar (reproduced in the district court's opinion, 253 F. Supp. at 240-242) that the notice provision is so miniscule as to be, from a practical standpoint, unnoticeable!

After remarking that the notice in a standard airline ticket was "in such exceedingly small and fine print as almost to defy reading", New York's highest state court recently stated:

> "Thus, although there was literal compliance with the prescription of Article 3, the question arises whether such compliance satisfies the Convention's demands when viewed in the light of its overall purposes. We do not believe that it does. *In our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention.*" (Emphasis added) *Egan* v. *Kollsman Instrument Corp.*, —— N. Y. 2d ——, December 28, 1967, Slip Op. pp. 6-7.

A comparison between the physical appearance of the Alitalia ticket and that of the model ticket annexed to the Conference minutes (p. 174) (a life-sized reproduction of the model ticket appears as Appendix A on p. A1 of this brief *amicus*) shows that the model contains a notice in prominent size type equal to that employed on the rest of the ticket. It states (as translated from the French):

> "This passenger ticket is subject to the terms of liability established by the International Convention of _____".

As shown in Point I, *supra*, the drafters of the Convention felt that basic fairness required the passenger to be given reasonable notice of the fact that his right to collect damages was being severely curtailed. This led to the requirement that a ticket containing a notice be delivered to the passenger before the carrier could claim the limitation of Article 22. If the notice provision is so small as to be virtually unreadable, and further if it is buried in

a "thicket of 'Conditions of Contract'," then there has not been the reasonable notice contemplated by the drafters and the carrier is not entitled to the damage limitation.

POINT III

Even if the notice contained in the ticket at bar is held to be readable, its language is so uninformative that it does not constitute the reasonable notice envisioned by the drafters and required by Article 3.

The model ticket (Conference minutes, 174) with its clear and definite statement that it *is* subject to the Convention, is in stark contrast to the Alitalia notice with its confusing and rambling language. One of the coupons in the ticket at bar (reproduced at 253 F. Supp. 242) states that the Warsaw Convention *may* be applicable; the Conditions of Contract state that it is applicable "unless such carriage is not 'international carriage' as defined by the Convention. (See carrier's tariffs, conditions of carriage for such definition.)" As the Second Circuit pointed out in its opinion below,

> "* * * even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon." 370 F. 2d at 514, n. 10.

Commentators have reached the same conclusion:

> "Even if the passenger could read the ticket, he would hunt in vain for warning of the liability limit." Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 512 (1967).

How can the passenger determine from the qualified notice provision in the ticket at bar whether his passage is or is not governed by the Convention unless he has inti-

mate knowledge of Article 1 of the Convention which defines "international transportation" or unless he is with an international aviation attorney?

The test as always is one of reasonableness.* The statement in the ticket at bar, couched as it is in terms of possibilities, with exceptions and references to tariffs, etc., is uninformative, unreasonable and therefore does not comply with the requirements of Article 3.

Conclusion

The notice provision contained in the Alitalia ticket is (a) unreadable because of its miniature type size, and (b) uninformative because of its language. The notice is therefore inadequate and unreasonable and does not meet the requirements of Article 3. The carrier is not entitled to the limitation of damages contained in Article 22, and the opinion below should be affirmed.

Respectfully submitted,

LEE S. KREINDLER,
Attorney for *Amicus Curiae*,
Bates Block,
99 Park Avenue,
New York, New York 10016.

Of Counsel:

KREINDLER & KREINDLER,
LEE S. KREINDLER,
GERALD A. ROBBIE.

---

* *Reasonable* notice does not necessarily mean *actual* notice and therefore Judge Moore's concern in his dissent below is unwarranted. It is not claimed that the carrier must provide actual notice, e.g., insist that the passenger read the ticket, provide him with an attorney, etc. However, a reasonable man should be able to at least see the notice provision without the aid of a magnifying glass, and understand it without having to consult an attorney.

Certificate

This is to certify that on the 5th day of February, 1968, copies of the above brief as *amicus curiae* were mailed, with first class postage attached, to Austin P. Magner, Esq. of the firm of Condon & Forsyth, One Rockefeller Plaza, New York, New York 10020, attorney for petitioner Alitalia-Linee Aeree Italiane, S.p.A., and Theodore E. Wolcott, Esq., 36 West 44th Street, New York, New York 10036, attorney for respondent John Lisi, *et al.*

LEE S. KREINDLER

ANNEXE

(Documents de transport visés à l'article 19 de l'Avant Projet de Convention)

MODÈLE I

BULLETIN INTERNATIONAL DE PASSAGE

RECTO

N°	N°	N°
Transporteur	*Transporteur*	*Transporteur*
Adresse	*Adresse*	*Adresse*
Points de départ:	Points de départ:	Points de départ:
et de destination:	et de destination:	et de destination:
via	*via*	*via*
Arrêts prévus	Arrêts prévus	Arrêts prévus
Date	Date	CONDITIONS DE TRANSPORT AU DOS
Service	Service	Billet délivré à ... le ...
Prix	Prix	pour le voyage
		Prix

VERSO

Le présent bulletin de passage est soumis au régime de la responsabilité établi par la Convention internationale du _____

DISPOSITIONS PRINCIPALES